No. 17-71353

IN THE

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

and

INTERNATIONAL UNION OF PAINTERS AND ALLIED TRADES, DISTRICT COUNCIL 15, LOCAL 159, AFL-CIO,
Intervenor,

v.

CAESARS ENTERTAINMENT, d/b/a
RIO ALL-SUITES HOTEL & CASINO,
Respondent.

On Application for Enforcement of an Order of the National Labor Relations Board
Case No. 28-CA-060841

BRIEF OF RESPONDENT CAESARS ENTERTAINMENT, D/B/A RIO ALL-SUITES HOTEL & CASINO

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, Respondent Caesars Entertainment Services, LLC ("CES"), a publicly traded corporation, states as follows:

1. The following entities own a percentage of CES:
    a. Caesars Entertainment Operating Company, Inc., a majority-owned subsidiary of Caesars Entertainment Corporation;
    b. Caesars Entertainment Resort Properties LLC; and
    c. Caesars Growth Properties Holdings, LLC.
2. The following affiliates of CES have issued shares to the public:
    a. Caesars Entertainment Corporation (CZR); and
    b. Caesars Acquisition Company (CACQ).
3. CES does not have any partially owned subsidiaries.

STATEMENT REGARDING ORAL ARGUMENT

Respondent Caesars Entertainment d/b/a Rio All-Suites Hotel and Casino ("Rio" or "Company") requests that the Court grant oral argument in this case. The resolution of these issues may affect employers throughout the Circuit who routinely promulgate and maintain workplace rules similar to those deemed unlawful by the Board.

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STATEMENT OF JURISDICTION

The Board entered its Decision and Order on August 27, 2015, finding unfair labor practices with respect to several allegations in its complaint and severing and remanding part of the case with respect to others. *See Caesars Entertainment d/b/a Rio All-Suites Hotel & Casino*, 362 NLRB No. 190 (2015). The National Labor Relations Board ("Board") filed an application for enforcement on May 11, 2017. The International Union of Painters and Allied Trades, District Council 15, Local 159 ("Local 159") filed a motion to intervene on May 12, 2017. Section 10(e) gives federal courts of appeals the "exclusive method of review in *one proceeding after a final order is made*." H.R. Rep. 1147, 74th Cong., 1st Sess., at 22 (1935) (emphasis added); *see* 29 U.S.C. § 160(e) (2016). As discussed below, a final order has not issued from the Board; therefore, this Court does not have exclusive jurisdiction to decide the Board's application.

STATEMENT OF THE ISSUES

1. Whether the Board erred in finding, against its own decision in *The Boeing Company*, that work rules restricting the use and possession of certain recording devices at the workplace, which were meant to safeguard guest privacy and the integrity of Rio's gaming operations, violated section 8(a)(1) of the NLRA?

2. Whether the Board erred in finding that a confidentiality policy tailored to protect guest privacy and prevent disclosure of important facts about the internal organization and performance of the business—not wages—violated the NLRA?

3. Whether this court has jurisdiction to enforce an administrative order that resolves some, but not all, of the allegations raised in a single complaint?

In accordance with Ninth Circuit Rule 28-2.7, pertinent statutes and rules are provided in the appendix attached hereto.

STATEMENT OF THE CASE

This case arises out of ten challenged work rules in an employee handbook. No one suffered adverse action as a result of the ten rules. No labor organization that represents any of Rio's employees challenged the handbook or any of its rules. Excerpt of the Record ("ER") at 194-195. In the absence of a representative relationship with Rio's employees, Local 159 filed an unfair labor charge against Rio with the Board. *Id.* That charge challenged ten handbook rules and ultimately resulted in the order underlying the Board's enforcement application. *Id.* Three such rules are at issue in the Board's enforcement application.[1] Two other rules that were part of the charge are still before the Board.

[1] Rio has not addressed the Board's order rescinding a fourth rule, which provides, "Employees who walk off the job during shift will be considered to have abandoned their job and voluntarily separated their employment." ER 139. As

A. Factual Background

Rio is one of several gaming and hospitality properties in Las Vegas, Nevada that are owned and operated by Caesars Entertainment Corporation. The Rio property employs more than 3,000 employees. *Id.* at 195. All 3,000 employees receive and acknowledge the same employee handbook. *Id.* at 109. The handbook governs the terms and conditions of employment, in some part, for Rio's total workforce. *Id.* But it is not unqualified: where the handbook is "in conflict with individual employment agreements, Collective Bargaining Agreements, plan descriptions or information contained in official company bulletins, the information in those documents will govern." *Id.* at 110.

For several years, some of Rio's employees have been covered by three collective bargaining agreements ("CBAs") between Rio and the four separate labor organizations that represent them. In recognition of its employees' rights under the National Labor Relations Act, 29 U.S.C. §§ 151-169 ("NLRA" or "Act"), Rio has agreed to adopt a number of policies that permit employees to engage in union-related speech and other concerted activity in the workplace, so long as they do not interfere with or compromise the Company's need to protect guest privacy and to safeguard Rio and its guests from illegal or unfair gaming activities.

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with the other rules, however, the Board's decision in *The Boeing Company* calls this finding into question.

For instance, although employers are not required to allow employees to use company bulletin boards to display union-related notices, *see Eaton Techs., Inc.*, 322 NLRB 848, 853 (1997) ("there is no statutory right of employees or a union to use an employer's bulletin board"), Rio has agreed through its CBAs to supply bulletin boards on which union notices can be displayed. ER at 270, 278. Consistent with this allowance, company bulletin boards have become a means for communicating and documenting union meetings and other concerted activities to all Rio employees regardless of union affiliation. So too with access by nonemployee union staff to the property; although lacking a statutory right, *see Lechmere, Inc. v. NLRB*, 502 U.S. 527, 532 (1992), Rio allows them access to meet with employees regarding their terms and conditions of employment. ER at 261–62; 268–69; 277. In short, company bulletin boards and union access are two means by which employees can exercise "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection," as well as the right "to refrain from any or all of such activities." 29 U.S.C. § 157 ("section 7").

Rio also strives to provide its customers with a high-quality gaming, entertainment, and hospitality experience by operating with utmost discretion to ensure that gaming on the property is conducted honestly and competitively.

Customer privacy is a core value of the Company. Rio seeks to promote the public confidence and trust that all persons can enjoy the casino's many offerings and leave with the impression that gaming on the property was conducted singly for the benefit of the casino's customers, rather than the tabloid press. Rio advances this core value because it is indispensable to the Company's reputation in the competitive gaming industry and because the regulations of the Nevada Gaming Commission require careful attention to fair gaming practice. *See* NRS § 463.0129.

One critical way that Rio advances this core value is through its guest privacy policy, which is set forth in its handbook under the section entitled "Rules of the Road," as follows:

> Guest Privacy: Employees are prohibited from violating guest/employee privacy by disclosing privileged information. This privileged information includes but is not limited to a guest's level of play, frequency of visitation, buy-in amounts, win/loss results or any other record of their play or personal information. This information must not be shared with anyone other than the guest or a co-worker who clearly has a business reason for needing to know. This prohibits disclosing information to the guest's family members, friends, or business associates – anyone other than the guest.
>
> As our Company expands both nationally and internationally and sponsors events such as the WSOP and celebrity golf outings, a chance encounter with an employee's favorite actors, sports idols, or other public figures is possible and can leave quite an impression. While it is exciting to see celebrities visiting our properties, we must be sure to maintain the highest level of professionalism and discretion. It is essential that employees respect a celebrity's right to privacy and discretion.

> This is an overview of the Company's confidentiality policies. An expanded version will be found in the Compliance Manual, which should be consulted. Compliance Polices change from time to time. For an up-to-date version of this policy, consult the Compliance Manual. If you have any questions regarding this policy or any of the other Compliance Policies, please consult the Corporate Compliance Officer. ER at 140-141.

The three work rules at issue in the Board's enforcement application were also printed in the "Rules of the Road" section of Rio's employee handbook, each within a single page of the guest privacy policy. *Id.* at 139–140. These rules were aimed at implementing Rio's no-recording and confidentiality policies. The other two rules at issue in this case related to employee use of e-mail and other computer resources for non-business purposes. As with the no-recording and confidentiality rules, these computer usage rules were also printed in the "Rules of the Road" section alongside the guest privacy policy. *Id.* at 140.

Although Rio's no-recording policy was explained in several places in the handbook, the Board focused on just two rules. The first rule restricted the use of personal phones with cameras:

> Personal pagers, beepers and cell phones worn by employees must not be visible or audible to guests and should not impact job performance. The use of personal cellular/digital phones is prohibited while on duty, but is allowed during break time in designated break areas. Camera phones may not be used to take photos on property without permission from a Director or above. *Id*. at 139.

Later in the same section of the handbook was a rule that restricted the workplace use of several other audiovisual recording devices:

> Cameras, any type of audio visual recording equipment and/or recording devices may not be used unless specifically authorized for business purposes (e.g., events). *Id.* at 140.

There was not a contractual right to use the recording devices described in either rule while on the Rio property; Rio never agreed to it in any of its three CBAs with the unions. Accordingly, the handbook's no-recording rules governed all employees.

A few short lines after the no-recording rules in the same section of the handbook, and immediately preceding Rio's guest privacy policy, was one of several handbook rules prohibiting the disclosure of confidential business information:

> **Confidentiality:** All employees are prohibited from disclosing to anyone outside of the Company, indirectly or directly, any information about the Company which has not been shared by the Company with the general public. This type of disclosure includes participation in internet chat rooms or message boards. Exceptions to this rule include disclosures which are authorized by the Company or required or authorized by the law. This information includes, but is not limited to:
>
> - Company financial data
> - Plans and strategies (development, marketing, business)
> - Organizational charts, salary structures, policy and procedures manuals
> - Research or analyses
> - Customer or supplier lists or related information
>
> The property or Corporate Law department should be consulted whenever there is a question about whether information is considered confidential. Any failure to uphold this policy should be communicated to the Law department and may result in immediate

> Separation of Employment. All managerial, supervisory, and selected positions are required to comply with the "Use and Disclosure of Confidential Information" policy. *Id.* at 140.

Four pages before the disputed confidentiality rule, also in the "Rules of the Road" section, employees would find Rio's computer usage policy. As with the no-recording and confidentiality policies, the Board focused on two rules among several that regulate how and when employees may use Rio's computer resources. The first rule was an application of Rio's broader confidentiality policy to company-owned computer software. The second rule regulated the ways employees were allowed to use computer resources owned and provided by Rio as a general matter.

B. The Complaint and the Decision of the Administrative Law Judge

None of the four labor organizations that represent Rio employees charged that these or other work rules in Rio's handbook violated the NLRA. *Id.* at 194-195. No grievance was ever filed challenging the rules. *Id.* at 88. Although neither Local 159 nor any of its affiliated labor organizations represented or sought to represent Rio employees, it responded to these rules by filing a variety of unfair labor practice charges against Rio. *Id.* at 194-195.

The Board subsequently filed a complaint asserting much the same charges. In its complaint, the Board alleged that Rio violated section 8(a)(1) by restricting, among other things, audiovisual recordings in the workplace, disclosure of certain

confidential information to the public, and use of the Company's e-mail system and other computer resources for unapproved non-business purposes. *Id.* at 97–100. In effect, the Board alleged that, although there is no right to possess or use cameras, other recording devices, e-mail, or other computer resources—what can be called "modalities" of communication—once Rio decided to restrict *some* modalities in its work rules, Rio had to make an explicit exception for possessing and using the restricted modalities while exercising the rights guaranteed by section 7 of the NLRA.

After holding a hearing, the ALJ sustained almost none of the Board's charges. As to the recording issue, the ALJ did not and could not identify any evidence suggesting that Rio promulgated the work rules in response to union activity, nor that the work rules explicitly restricted section 7 rights. According to the ALJ, Rio's stated privacy interests would cause "the typical hotel employee [to] perceive that the rule at issue here has nothing at all to do with their right to engage in union or concerted activities." *Id.* at 204. Not only that, but, in the ALJ's view, the Company's privacy interest allowed it to restrict recording on the property "[i]n the same sense that an employer may discharge an employee for good reason, bad reason, or no reason at all, so long as it is not a reason prohibited by law." *Id.* at 203.

As to the confidentiality rule, the ALJ looked to the Board's decision in *Mediaone of Greater Florida, Inc.* (340 NLRB No. 3 (2003)), which, according to the ALJ, "already held that an employer's rule that barred the disclosure of 'organizational charts and databases' (the latter would almost certainly contain an employer's salary structures) among numerous other matters do not explicitly restrict Section 7 activity." ER at 200. As to employees' reading of the rule, the ALJ found it doubtful they would "misinterpret [the rule] as a restriction on their Section 7 right to disclose information . . . concerning their wages, hours, and other terms and conditions of employment." *Id.*

The ALJ also rejected the Board's argument that the computer usage rules explicitly restricted section 7 rights. Relying on the Board's decision in *Register Guard*, 351 NLRB 1110 (2007), the ALJ explained that "the computer usage rule does not explicitly import the definition of 'confidential' from the handbook's confidentiality rules," and "that the scope of the confidentiality rule gains its meaning from its specific context" in the handbook. ER at 202. Under the circumstances, the ALJ concluded that the Board had not met its burden of showing that a reasonable employee would interpret the computer usage rules as restricting union activity. *Id.*

C. The Decision of the Board

In a partially divided decision, the Board reversed the ALJ's ruling on both the no-recording and confidentiality rules. As to the no-recording rules, the majority first rejected the ALJ's reasoning and found that "photographing and videotaping is protected by Section 7 when employees are acting in concert for their mutual aid," then concluded that reasonable employees would read the rules to restrict section 7 activity without an explicit exception in place, and found that Rio failed to link its interests in protecting guest privacy and fair gaming to the rules. *Id.* at 11. As to the confidentiality rule, the majority first reiterated its presumption—unanchored by precedent—that without an explicit exception, the rule "implicates terms and conditions of employment that the Board has found to be protected by Section 7." *Id.* at 9. The majority also suggested that the illustrations of prohibited disclosures were distinguishable from the restrictions on disclosing "particularized information" that the Board found to be lawful in *Mediaone of Greater Florida*.

Member Johnson dissented from the majority's conclusion that Rio violated the Act by maintaining a no-recording rule. As he explained, "there is no Sec. 7 right to *possession* of a camera or other recording devise by employees on an employer's property, nor is there an inherent right to use a camera or other recording device in the course of Sec. 7 activity." ER at 12. Because Rio's

"employees would certainly understand its weighty interests in protecting guest privacy and in protecting both the Respondent and guests from illegal or unfair gambling activities," and that these interests were "contextually tied to the rules at issue" in the handbook, Member Johnson concluded that the Board's decision was arbitrary and inconsistent with the Act. *Id.*

Member Johnson also faulted the majority for undermining its decision in *Mediaone* by finding Rio's confidentiality rule unlawful despite the rule's "examples of undisputedly confidential company information that are the same or nearly the same as the 'particularized' examples in *Mediaone*," a case which was "correctly decided and that is still good law." *Id.* at 10. As he explained, the rule's examples "provide sufficient context for employees to understand that prohibited disclosures are limited to proprietary information and would not reasonably be understood as extending to discussion of employee wages or other terms and conditions of employment." *Id.*

As to the computer usage rules, the Board retroactively applied its decision in *Purple Communications, Inc.*, 361 NLRB No. 126 (2014), and "remanded the case to allow for the introduction of evidence" under the newly adopted test. ER at 12. Without pointing to a rule or regulation, or even any sub-regulatory agency guidance, the Board held that it would "sever and remand the allegation concerning the Respondent's rules entitled 'Use of Company Systems, Equipment, and

Resources' to the administrative law judge for further proceedings consistent with *Purple Communications*, including allowing the parties to introduce evidence relevant to a determination of lawfulness of those rules." *Id.* Nearly two years later, while those proceedings were still underway, the Board filed its application for enforcement. Since then, the ALJ assigned to the case made findings with respect to the computer usage rules, which the Board has yet to review.

D. The Board Overrules Its Prior Decision

Meanwhile, the Board was asked to reassess its reasoning here through a challenge to a similar no-recording rule in *The Boeing Company*. There, the Board not only found that the no-recording rule was lawful, but also overruled its earlier finding in this case that "a similar rule was unlawful." *The Boeing Company*, 365 NLRB No. 154, slip op. at 19 n.89 (Dec. 14, 2017). According to the Board, the "majority in *Rio All-Suites Hotel* improperly limited [an earlier Board decision] *Flagstaff* to the facts of that case and failed to give appropriate weight to the casino operator's interests in 'safeguarding guest privacy and the integrity of the Respondent's gaming operations.'" *Id.* In overruling the Board's holding as to the no-recording rule in this case, the Board also adopted a new standard for evaluating all facially neutral handbook rules, as here: asking whether the rule, "when reasonably interpreted, would potentially interfere with Section 7 rights," the Board announced that it would "evaluate two things: (i) the nature and extent

of the potential impact on NLRA rights, *and* (ii) legitimate justifications associated with the requirement(s)." *Id.*, slip op. at 14. This standard, the Board concluded, would apply "retroactively . . . to all other pending cases." *Id.*, slip op. at 17.

SUMMARY OF ARGUMENT

This case is a classic illustration of how the NLRB's ever-shifting legal landscape makes it nearly impossible for employers to avoid unfair labor practice charges—a fact the Board conceded in overruling the decision underlying this application. For decades the Board and the courts have reiterated the common sense rule that employers are permitted to impose restrictions on the possession and use of cameras, tape recorders, audiovisual equipment, and other modalities of communication in the workplace. Likewise, both the Board and the courts consistently have reiterated that employers are permitted to impose restrictions on the dissemination of proprietary business information rather than to prohibit discussion of employee wages. Both rules sensibly allow employers to permit more union activity than strictly necessary while retaining the ability to protect vital business interests, especially in the gaming and hospitality industry where the delicate balance of guest privacy and fair gaming practice would otherwise conflict with individual desires to record and broadcast guests' personal lives and the business's inner workings that have nothing to do with the terms and conditions of employment.

Acting in good-faith reliance on those settled rules, Rio concluded that it could prohibit its employees from recording company property and disclosing indisputably proprietary business information through common sense work rules written in simple prose. The Board responded by declaring these heretofore valid actions *presumptively* invalid and then made its new presumption both retroactive and virtually unrebuttable—because, under the Board's now-overruled per se rule, nearly every work rule must make an explicit exception for section 7 activity or else wrestle with an unfair labor practice charge. The Board's actions, which ultimately will lead employers to adopt work rules designed only to be understandable to labor lawyers, find no support in law, logic, or fact.

It is both well settled and sensible that a hotel and casino is entitled to restrict recording on its property to protect guests from anything that would disrupt their privacy or fair gaming experience; a handheld camera recording a game of cards belies any impression that a guest's gaming experience is anything but evenhanded. There is no rational reason for reversing that sensible rule simply because a casino and hotel has not specifically excepted section 7 activity from its prohibition. Indeed, reasonable casino employees trained in hospitality and gaming would not read a no-recording rule in an employee handbook under the same title as the casino's guest privacy policy and rush to the conclusion that the work rule will prevent them from organizing or even documenting their organizing

activities. The Board's unsupported per se rule cannot help but take an otherwise simple rule and convert it to a litany of technical exceptions until the rule is either indecipherable or gutted at its core.

Even if there were any valid basis for reversing decades-old precedent based on a now-overruled legal standard—which there is not—there certainly is no basis to conclude that a work rule which regulates only the means or modality by which protected concerted activity is carried out, not the activity itself, somehow violates the Act. Yet that is precisely what the Board did in this case, dismissing the unremarkable settled rule that employers violate the NLRA by maintaining a rule that obstructs section 7 activity itself, not the means by which that activity is carried out. Of course the Board has long recognized that various modalities of communication and organization can be used to engage in protected concerted activity: bulletin boards are often the workplace pulpit for communicating the terms and conditions of employment; access to the workplace by nonemployee union staff is sometimes the machinery of a campaign to organize employees—but none is guaranteed by the Act. The Board's contrary view regarding recording devices demonstrates a disturbing tendency to elevate its vision of labor policy over long-settled precedent, indisputable business justifications, and common sense.

The Board's conclusions regarding the confidentiality rule suffer from the same basic defects. It is equally well settled that employers may impose neutral restrictions on disclosing proprietary business information, especially when written in such a way as not to restrict employees from disclosing their wage information in the normal course of events to banks, credit agencies, or mortgage lenders. That is what Rio did here in its handbook, which sets forth examples of proprietary information using the same language the Board has long found lawful: company financial data; plans and strategies; organizational charts, salary structures, policy and procedures manuals; research or analyses; and customer or supplier lists. Yet according to the Board, a reasonable employee here would read the rule's general prohibition against disclosing "any information about the Company which has not been shared by the Company with the general public" in isolation, lopped off from the examples that accompany it in the text and splintered from the Company's privacy policy one line below. Thus, even though the rule here provided the very same or nearly the same examples of indisputably proprietary information under settled Board precedent, the Board still concluded that the rule violated the Act because it did not make explicit exceptions for section 7 activity. In other words, the Board, against its own precedent and common sense, effectively rewrote the confidentiality rule here to render all but a single sentence superfluous.

To add final insult to injury, the Board prematurely petitioned this court to enforce an order that resolves some, but not all, of the allegations raised in a single complaint. Because the Board's failure to resolve all the allegations of the complaint renders the order nonfinal, the court lacks jurisdiction to enforce the order. That is particularly true here because the scope of the remedy—correction of the employee handbook—necessarily turns on adjudication of the remaining allegations. Yet the Board attempts to sidestep that otherwise routine conclusion by asserting that it can manufacture jurisdiction in this court by dint of deciding a portion of the case while "severing" and remanding the rest. The Board's made-up severance procedure—described nowhere in the Board's rules or regulations—cannot circumvent the bedrock requirement of finality. The Act, the sole source of this court's jurisdiction here, requires an application from a final order such that jurisdiction of the court shall be exclusive; nonfinal orders with incomplete remedies are not ripe for appellate review.

STANDARD OF REVIEW

Although courts "defer to the rules imposed by the NLRB if . . . 'they are rational and consistent with the [National Labor Relations Act],'" *Sever v. NLRB*, 231 F.3d 1156, 1164 (9th Cir. 2000) (quoting *Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359, 376 (1998)), "the Board must be required to apply in fact the clearly understood legal standards that it enunciates in principle," *Allentown*

Mack, 522 U.S. at 364. Accordingly, a Board decision should be upheld only if it is "rational and consistent with the Act," *Local Joint Exec. Bd. of Las Vegas, Culinary Workers Union Local 226 v. NLRB*, 309 F.3d 578, 583 (9th Cir. 2002), and its "explication is not inadequate, irrational or arbitrary," *Sever*, 231 F.3d at 1164 (quoting *Allentown Mack*, 522, U.S. at 364).

ARGUMENT

I. RIO DID NOT VIOLATE THE NLRA BY MAINTAINING A WORK RULE RESTRICTING THE POSSESSION AND USE OF RECORDING DEVICES IN THE WORKPLACE.

The Board conceded that it was wrong in holding—over a sharp dissent—that Rio violated the NLRA by maintaining a handbook rule restricting the possession and use of cameras, camera phones, audiovisual and other recording equipment in the workplace. That the Board now seeks enforcement of its overruled decision complies with neither established law nor common sense, and is "remarkably indifferent to the concerns and sensitivity that lead employers to adopt rules intended to maintain a civil and decent workplace." *Medco Health Sols. of Las Vegas, Inc. v. NLRB*, 701 F.3d 710, 718 (D.C. Cir. 2012) (internal quotation marks omitted).

That is true whether viewed under the Board's new standard or its now-discarded standard for evaluating whether a workplace rule violates section 8(a)(1). If the rule explicitly prohibits protected activity, then of course it is unlawful. *See*

Boeing, slip op. at 15; *see also Martin Luther Mem'l Home, Inc. d/b/a Lutheran Heritage Village-Livonia ("Lutheran Heritage")*, 343 NLRB 646, 646 (2004), *overruled by Boeing*, slip op. at 19 n.89. If the rule does not, under the old standard, it is unlawful only if "(1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights." *Id.* at 647. Under the new standard, such a rule cannot be unlawful if, "when reasonably interpreted," the Board finds that "the nature and extent of the potential impact on NLRA rights" is outweighed by "legitimate justifications associated with the requirement(s)." *Boeing*, slip op. at 14.

"In determining whether a challenged rule is unlawful, the Board must . . . give the rule a reasonable reading. It must refrain from reading particular phrases in isolation, and it must not presume improper interference with employee rights." *Lutheran Heritage*, 343 NLRB at 646. It is not enough that the rule "merely could possibly be read" to restrict employee rights; instead, it must be reasonable for employees to interpret the rule that way. *NLRB v. Arkema, Inc.*, 710 F.3d 308, 318 (5th Cir. 2003). These interpretive principles—which give employers great leeway to adopt reasonable rules—especially serve to accommodate gaming employers' important interests in advancing "legitimate business purposes," such as in protecting customer privacy, *see Lutheran Heritage*, 343 NLRB at 647, and

avoiding the "significant financial risk" of liability for illegal or unfair gambling activities, *see Adtranz ABB Daimler-Benz Transp., N.A. v. NLRB*, 253 F.3d 19, 27 (D.C. Cir. 2001).

In any case, the Board's conclusion that Rio violated the NLRA by maintaining two work rules restricting the possession and use of certain modalities of recording is unsustainable. It is undisputed that the rules do not explicitly prohibit protected activity. ER at 17–18. The Board likewise does not contend that the policy has ever been applied to restrict protected activity. *Id*. at 16. Indeed, the Board does not even contend that employees have a right to possess and use a camera or other recording device on an employer's property. *See, e.g.*, *Flagstaff Med. Ctr.*, 357 NLRB 659, 663 (2011). Instead the Board found that the policies were unlawful solely because, in the Board's view, the policies could reasonably be read to prohibit protected activity and because, in the Board's view, the two rules "would prohibit [employee] use of audiovisual devices in furtherance of their protected concerted activities." ER at 11. There is no support for this finding in law, logic, or common sense.

A. The Board Concedes that Its Decision Is Legally Inconsistent.

First, as the *Boeing* Board explained, the "majority in *Rio All-Suites Hotel* improperly limited *Flagstaff* to the facts of that case and failed to give appropriate weight to the casino operator's interests in 'safeguarding guest privacy and the

integrity of the Respondent's gaming operations.'" *Boeing*, slip op. at 19 n.89. On the other hand, the Board now seeks enforcement of the finding in its original order that "[u]nlike the rule in *Flagstaff*, which expressly referenced 'recording images of patients,' the rules presented here include no indication that they are designed to protect privacy or other legitimate interests.'" ER at 11. Obviously Rio could not comply with both instructions simultaneously, so it did the best thing it could under the circumstances to try to follow the law: It maintained a facially neutral rule based on straightforward justifications associated with the rule. Namely, it followed the standard that the Board itself retroactively adopted in abandoning the "substantial limitations" of *Lutheran Heritage* and its "departure from the type of balancing required by Supreme Court precedent and the Board's own decisions." *Boeing*, slip op. at 14. In a word, the Board overruled the order that it now seeks to enforce.

That just underscores the utter irrationality of the situation the Board has created. There is clearly no practical difference between the facts of the case as they existed at the time of the Board's original order and the date the Board issued its decision in *Boeing*. Faced with the identical rule it previously found unlawful, the *Boeing* Board found that the very same "no-camera rule did not constitute unlawful interference with protected rights in violation of Section 8(a)(1) of the Act." *Boeing*, slip op. at 19. Not only that but the Board retroactively adopted the

standard by which it made its contradictory finding because, "failing to apply the new standard retroactively would 'produc[e] a result which is contrary to a statutory design or to legal and equitable principles.'" *Id.* at 17 (quoting *SEC v. Chenery Corp.*, 332 U.S. 194, 203 (1947)). Accordingly, if it really were the case that the Board even has an order from which to seek enforcement—an order that the Board itself expressly overruled—then it is hard to see how attacking its own finding and the standard by which it made its finding and then seeking enforcement of the very same finding is anything but inadequate, irrational, and arbitrary.

B. The Board's Janus-Faced Application of *Lutheran Heritage* Is Fundamentally Flawed.

Even under the now-discarded standard, as Board Member Johnson explained in dissent, "*[k]nowing the obvious reasons for these rules*, the Respondent's employees would similarly and reasonably interpret them as legitimate means of safeguarding guest privacy and the integrity of the Respondent's gaming operations, not as prohibitions of protected activity." ER at 12. Notwithstanding the majority's contention that the rules somehow "failed to link this or any other interest to the prohibitions at issue here," *id.* at 11, the rules themselves are just two numbered paragraphs in a section of the handbook entitled "Rules of the Road"; neither that section nor the rules give any hint of altering or extending the no-recording policy to include photographing and videotaping "when employees are acting in concert for their mutual aid and protection and no

overriding employer interest is present," *id.* at 11. To the contrary, the rules simply reiterate the broader guest privacy policy that is in the same section of the handbook as the rules, and that "impress[es] upon employees the importance of . . . protecting both Respondent and guests from illegal or unfair gambling activities." *Id.* at 12. As "there [is] no inherent right to use a camera or other recording device in the course of Sec. 7 activity," *id.*, no reasonable employee could view a rule that prohibits recording in the context of guest privacy as an interference with section 7 rights.

According to the majority, the rules cross the line by failing to restate the admonition that "employees are not to share 'privileged information' about guests' gaming habits and to respect celebrities' privacy." *Id.* at 11. In its view, the handbook went wrong because it did not make an explicit exception for section 7 activity in its no-recording policy. From this perceived deficiency, employees would somehow read the rules to prohibit documenting "employee picketing," "unsafe workplace equipment," or "hazardous working conditions." *Id*. That leap of logic is belied by both common sense and fact.

The rules themselves contain not one word suggesting that the no-recording policy was intended to chill the exercise of section 7 rights. To the contrary, the rules specifically provide that audiovisual equipment "must not be visible or audible to guests and should not impact job performance . . . while on duty," *id.* at

139, other than when "specifically authorized for business purposes," *id.* at 140. Moreover, these rules appear on the same page as the Company's guest privacy policy. To be sure, in the decade since the rules were put in place, the policy has not been enforced to restrict section 7 activity, nor have any of the four labor organizations that represent Rio employees protested that the rules chill union organizing, much less filed a grievance. *Id.* at 87-88. Just as in *Lutheran Heritage*, then, there is simply "no justification for concluding that employees will interpret the rule unreasonably" to prevent them from exercising section 7 rights. *Lutheran Heritage*, 343 NLRB at 648.

Not only would a contrary conclusion be legally improper, but it would have significant practical consequences. When applied to the Federal Labor Relations Act, 5 U.S.C. §§ 7101-7135, it could deprive this court of its authority to apply Federal Rule of Criminal Procedure 53 to its own proceedings. The upshot of the Board's position is that no-recording work rules that do not make an explicit exception for section 7 activity are presumed unlawful. Therefore, by the Board's logic, Rule 53's requirement that "the court must not permit the taking of photographs in the courtroom during judicial proceedings" would be read by a reasonable court employee to chill union organizing. That jarring result is precisely why the Board's position is practically unsustainable.

The Board's decisions in *T-Mobile* and *Whole Foods* do not suggest otherwise, and neither is controlling because each was decided after the Board made its finding in this case. Within four months of the Board's finding, *Whole Foods* found a section 8(a)(1) violation where a work rule restricted recording at the workplace to protect employee privacy at selected events, such as "annual town hall meetings and termination-appeal peer panels." *Whole Foods Market, Inc.*, 363 NLRB No. 87, slip op. at 4 (2015). One year later, *T-Mobile* found a section 8(a)(1) violation where a work rule restricted employees from using recording equipment in the workplace to "prevent harassment, maintain individual privacy, encourage open communication, and protect confidential information." *T-Mobile USA, Inc.*, 363 NLRB No. 171, slip op. at 3 (2016). By contrast, the handbook rules in this case go to the engine of Rio's business: giving guests the impression that each time they visit the property, they will enjoy an honest and competitive gaming and hospitality experience. As the *T-Mobile* court recognized, such narrowly tailored rules "would not be interpreted by a reasonable . . . employee as forbidding protected activity." *T-Mobile USA, Inc. v. NLRB*, 865 F.3d 265, 275 (5th Cir. 2017).

Finally, the Board was just as wrong to find that "respondent tied neither the prohibition at issue here to any particularized interest, such as the privacy of patrons." ER at 11. As Member Johnson explained in an earlier dissent, "the

majority signals its intent to steer the Board away from the carefully balanced framework and practical approach established in [*Lutheran Heritage*] towards a presumption that certain rules are unlawful unless there is an explicit exception for Section 7 activity." *Fresh & Easy Neighborhood Mkt.*, 361 NLRB No. 8, slip op. at 4 (2014). That balanced framework required balancing "the undisputed right of self-organization assured to employees under the Wagner Act and the equally undisputed right of employers to maintain discipline in their establishments." *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998). The work rules at issue do not somehow convert Rio's stated interest in guest privacy into isolated restrictions on recording union activity.

In fact, the Board rejected a nearly identical argument in *U-Haul*. There, an employee handbook required employees to bring work-related complaints first to management. *See U-Haul Co. of Cal.*, 347 NLRB 375, 378 (2006). One of the Board's regional directors alleged that the employer violated section 8(a)(1) by maintaining a handbook that restricted protected concerted activity. The Board rejected the allegation because the handbook rule immediately preceded the employer's policy that employees can speak up for themselves at all levels of management and would be given a responsible reply. *See id.* The Board has not since departed from the logic of *U-Haul* in which employers can justifiably use simple prose in employee handbooks to convey work rules through the handbook's

entire text, in view of its structure and the physical and logical relation of its parts. That logic was the basis for upholding many handbook rules challenged before the Board. *See, e.g.*, *Guardsmark, LLC*, 344 NLRB 809, 810 (2005) (employer's rule against fraternizing with client employees or with co-employees was not unlawful where employees would reasonably understand the rule to prohibit only personal entanglements because the rule appeared alongside a rule against dating client employees).

So too here. Indeed, the Board's finding in this case is, if anything, incompatible with the logic of *U-Haul*. Moreover, the kind of work environment in which the disputed no-recording rules operate—a casino—would lead any reasonable employee to interpret the no-recording policy as a "legitimate means of protecting the privacy" of guests, "not as a prohibition of protected activity." *Flagstaff*, 357 NLRB at 663. The Board made precisely the same finding in *Flagstaff* where a reasonable hospital employee would interpret a rule against photographing hospital patients, property, or facilities as a legitimate means of protecting patient privacy. *See id.* As with a hospital's interest in abiding by HIPPA privacy requirements, the Board does not dispute that a hotel and casino has a strong interest in protecting and guarding guest privacy, even though its guests do not always enjoy an equal amount of legal protections as hospital patients. Not only does the handbook memorialize that interest in writing, but the

work environment suggests to a reasonable hotel and casino employee that the appearance of violating a guest policy, such as through using or displaying recording devices at work, would undermine the business.

In short, the work environment and a whole-text reading of the handbook show that a reasonable employee would construe Rio's anti-recording policy as protecting guest privacy, not as chilling protected concerted activity. Rio's policy toward recordings was entirely consistent with the law that governed at the time, and the rule the Board seeks to affirm without so much as a reason for departing from the old falls short of the requirements of the Administrative Procedure Act ("APA"). Because nothing in section 8(a)(1) prohibits an employer from maintaining Rio's eminently reasonable policy, the Board's contrary decision cannot be sustained.

C. The Board's "All or Nothing" Approach Toward Recording Restrictions Is Not Legally Sustainable.

The Board fared no better with the conclusion that "[e]mployee photographing and videotaping is protected by Section 7 when employees are acting in concert for their mutual aid and protection." ER at 11. Consistent with settled law permitting an employer to impose neutral restrictions on the "particular means by which employees may seek to communicate," much less organize, *see Guardian Indus. Corp. v. NLRB*, 49 F.3d 317, 318 (7th Cir. 1995), Rio provided employees myriad means of communicating and organizing, such as union bulletin

boards, employee break rooms, and union access. *See, e.g.*, ER 256–78. Rio did not violate the NLRA by maintaining a neutral work rule that restricted the possession and use of some modalities of communication—particularly recording devices—in the workplace. The Board's contrary conclusion has the aberrant result of confusing the means or modality of union organizing with actual concerted activity that is protected by the NLRA.

"Section 7 of the Act protects organizational rights . . . rather than particular means by which employees may seek to communicate." *Guardian Indus. Corp. v. NLRB*, 49 F.3d at 318. Put another way, the NLRA "does not command that labor organizations as a matter of abstract law, under all circumstances, be protected in the use of every possible means of reaching the minds of individual workers, nor that they are entitled to use a medium of communications." *NLRB v. United Steelworkers of Am. (Nutone)*, 357 U.S. 357, 363–64 (1958). To the contrary, the NLRA requires the employer to yield its property interests only to the extent necessary to ensure that employees will not be "entirely deprived," *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 801 n.6 (1945), of their ability to engage in section 7 communications. "It does not require the most convenient or most effective means of conducting those communications." *Register-Guard*, 351 NLRB 1110, 1115 (2007). Accordingly, an employer may restrict the possession

and use of recording devices without abridging "a statutory right to use . . . devices" for documenting section 7 activity. *Id*.

For example, "a *nonemployee* union organizer," who may well be the machinery of an *employee* organizing campaign, "ha[s] no section 7 right of access to [an employer's] property." *Stanford Hosp. & Clinics v. NLRB*, 325 F.3d 334, 346 (D.C. Cir. 2003) (emphasis added). Indeed, although "[n]o restriction may be placed on the employees' right to discuss self-organization among themselves," *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 113 (1956), it has long been settled that section 7 does not reach beyond the person of the employee—whether a union organizer or an inanimate object brought to the workplace to aid an organizing campaign, *see Lechmere, Inc. v. NLRB*, 502 U.S. 527, 532 (1992).

Likewise, "the right of labor organization does not imply that the employer must promote unions by giving them special access to bulletin boards." *Guardian Indus.*, 49 F.3d at 318. To the contrary, "[i]t is well established that there is no statutory right of employees or a union to use an employer's bulletin board. *Eaton Techs.*, 322 NLRB at 853. Therefore, "an employer may 'uniformly enforce a rule prohibiting the use of its bulletin boards by employees for all purposes,'" including for union-related messages. *Id.* (citation omitted) Despite the absence of a statutory right to use bulletin boards, the Board unremarkably has found that union newsletters posted on company bulletin boards constitute section 7 activity. *See*,

e.g., *Container Corp. of Am.*, 244 NLRB 318, 321 (1979). That does not mean, however, that an employer may not "insist upon the imposition of limitations, restrictions, and regulations on" bulletin board access. *Stevens Graphics, Inc.*, 339 NLRB 457, 461 (2003). It just means that "the employer may not . . . bar the union from posting notices where it allows indiscriminate employee use of its bulletin boards for posting matters of general concern unrelated to union activity." *Container Corp.*, 244 NLRB at 321.

In other words, the critical question is whether the employer is maintaining a rule that obstructs section 7 activity itself, not the means by which that activity is carried out. Only where it is doing the former will it violate the law. *Cf. Helton v. NLRB*, 656 F.2d 883, 888-97 (D.C. Cir. 1981) (holding that union committed unfair labor practice by removing employee speech critical of union from bulletin boards where other employee speech was permitted). Here, the answer to that critical question is found in the text of the rules: the rules restrict the operation of "camera phones," "[c]ameras, any type of audio visual recording equipment and/or recording devices" in the workplace, ER 139–140, not the concerted activity that such equipment can be used to document. Without that equipment, Rio's employees were not prevented from organizing, *cf. Bill's Elec., Inc.*, 350 NLRB 292, 295 (2007) (salts who voluntarily videotaped their employment application process despite employer's request that they stop committed misconduct outside

protection of NLRA), or even documenting their organization efforts, *see, e.g.*, *Esco Elevators*, 276 NLRB 1245, 1246 (1985) (employee who acted on his own in complaining about safety problem and documenting his complaint in writing was engaged in section 7 activity).

That much is clear from the Board's own precedent: the Board in *Flagstaff* already dismissed the idea that employees are incapable of organizing a union or exercising their statutory rights under the NLRA without the use of recording devices. *See Flagstaff Med. Ctr.*, 357 NLRB 659, 663 (2011) ("rule against photographing hospital property does not expressly restrict Section 7 activity."). *Flagstaff* cannot be meaningfully distinguished from this case because when its logic is applied, nothing prevents Rio from discharging or disciplining an employee for any reason—or no reason whatsoever—so long as it is not a reason prohibited by law. The Board agrees that Rio's no-recording rules did not explicitly restrict section 7 activity or were promulgated in response to it; without evidence to the contrary, *Flagstaff* holds that a neutral rule restricting audiovisual recording when employees enjoy myriad alternatives by which they can document their concerted activities is not a violation of the Act.

The Board's decision in *Hawaii Tribune-Herald* does not suggest otherwise. *Hawaii Tribune-Herald* found a section 8(a)(1) violation where an employee was instructed by his union to take notes at an investigatory meeting after his employer

denied him union representation, but instead tape recorded the conversation and was terminated for it, even though no work rule was in place barring such recording. 356 NLRB 661, 662 (2011).[2] By contrast, the question of this case—whether to revoke a no-recording work rule that was published in an employee handbook—is more similar to *Bill's Electric*, in which employees, despite acting in concert, lost the protection of the Act by violating a no-recording work rule. *See Bill's Elec.*, 350 NLRB at 295. As the sister circuit enforcing *Hawaii Tribune-Herald* recognized, the reason for the section 8(a)(1) violation in that case was not that the recording itself was protected by the Act, but "there was no then-existing company policy prohibiting [employees] from planning to make, or . . . from making a secret audio recording." *Stephens Media, LLC v. NLRB*, 677 F.3d 1241, 1256 (D.C. Cir. 2012). The upshot is that with a no-recording rule in place, the employee would have enjoyed the protection of the Act only had he used a modality other than tape recording—such as note-taking—to document his concerted activity. The Board cannot now rely on *Hawaii Tribune-Herald* to make the logical leap that the absence of "a *per se* rule against the making of secret audio

[2] For the same proposition, the Board cites *Hyundai Am. Shipping Agency, Inc.*, 357 NLRB 860 (2011); *White Oak Manor*, 353 NLRB 795 (2009); *Opryland Hotel*, 323 NLRB 723 (1997); and *Sullivan, Long & Hagerty*, 303 NLRB 1007 (1991), which together follow the same logic as *Hawaii Tribune-Herald* that makes them distinguishable.

recordings," *id.* at 1245, 1257, somehow makes any rule against recording *per se* unlawful.

Finally, the facts here do not support a finding that a ban on certain recording devices would chill protected concerted activity any more than a ban on electric power tools in the workplace would chill protected activity under the Occupational Safety and Health Act ("OSHA"). Nothing in the OSHA regulations even suggests that such a work rule would prevent employees from documenting and reporting safety violations in the workplace, even though an electric tape measure could be—although need not be—used for just that purpose. The NLRA is no different: while an audiovisual recording device is one way to document concerted activity, as with OSHA, it is needed neither to document nor engage in the activity itself.

But any comparisons to OSHA aside, the law protects certain concerted activity, not the means and modalities by which that activity is carried out or documented. Where, as here, the Board fails to consistently apply its own precedent, and where, as here, the work rules rise or fall on that precedent, the Board's decision should not be upheld: the operation of a recording device, even in concert with co-workers, is not protected by the Act. A non-existent right should not trump Rio's need to protect guests' privacy and to safeguard them from

illegal or unfair gaming activities—a need that is stated on the face of its handbook.

II. RIO DID NOT VIOLATE THE NLRA BY MAINTAINING A CONFIDENTIALITY POLICY THAT PRESERVED GUEST PRIVACY AND PROTECTED IMPORTANT FACTS ABOUT THE BUSINESS ORGANIZATION

The Board also erred—and continued to undervalue and undermine its own precedent—by finding that Rio violated section 8(a)(1) by restricting disclosure of indisputably confidential company information. Before this case, the Board had never before interpreted the NLRA to prohibit employers from protecting "business plans," "marketing plans," "trade secrets," "financial information," "patents," and "copyrights" within the larger context of "proprietary information." *Mediaone of Greater Fla.*, 340 NLRB at 279 (quoting *Lafayette Park*, 326 NLRB at 826). And with good reason, as the Board's own precedent *requires* employers to bargain collectively the terms and conditions of employment with certified unions whatever the organizational structure or financial state of the business. *See Cedarcrest Inc.*, 246 NLRB 870, 875 (1979) ("fact that Respondent may in fact have been experiencing financial difficulty does not exempt it from its [obligation under section 8(a)(5)].").

A. The Board's Conclusion That Reasonable Employees Would Read the Rule to Restrict Protected Activity Cannot Be Reconciled with the Act.

Having required employers to bargain collectively the terms and conditions of employment where a union is the certified representative of the bargaining unit, the Board has adopted the sensible rule that employers may not punish employees for discussing the terms and conditions of their employment with family and friends. *Lafayette Park,* 326 NLRB at 826. In particular, employees must be free to discuss "their own wages or attempt[] to determine what other employees are paid." *Mediaone*, 340 NLRB at 279. A work rule that "does not itself bar employees from compiling or determining wage information on their own," however, "is insufficient to support a finding that the policy so adversely affects the employees' ability to do so that any attempt would be meaningless." *Int'l Bus. Machs. Corp.*, 265 NLRB 638, 638 (1982). So too is a neutral work rule that "employees would not reasonably construe . . . as precluding them from disclosing their wage information in the normal course of events to banks, credit agencies, and similar entities" not a violation of section 8(a)(1). *Lafayette Park Hotel*, 326 NLRB at 826.

The Board failed to follow that straightforward rule here. Instead of applying the now-abandoned standard and asking whether a reasonable employee would read the confidentiality rule in context with the "particularized examples,"

the company compliance manual, and the guest privacy policy one line immediately below it in the handbook, the Board asked whether the "list of illustrations of prohibited disclosure . . . go to the very core of protected concerted activity, leaving employees to reasonably conclude that this rule prohibits their Section 7 activity." ER at 9. In other words, the Board effectively applied a per se rule that any work rule protecting disclosure of an employer's proprietary business information is unlawful absent a disclaimer that the rule does not cover the terms and conditions of employment—here wages. That analysis squarely conflicts with *Lafayette Park*—on which employers have been relying for two decades—which specifically held that an employer *can* protect proprietary business information, so long as the work rule does not explicitly prevent employees from disclosing their wages in the normal course of events, as they would to a mortgage lender, a credit-rating agency, or, of course, a co-worker. 326 NLRB at 826. *See id.* (sustaining work rule prohibiting disclosure of "hotel-private information"); *see also K-Mart*, 330 NLRB 263, 264 (1999) (sustaining policy that provided, "Company business and documents are confidential. Disclosure of such information is prohibited.").

Here, nothing about Rio's confidentiality rule either explicitly or implicitly prevented employees from discussing their wages. The Board did not allege that the rule explicitly restricted such discussion. ER at 8. Nor, as Member Johnson explained in dissent, are the "particularized examples" in the rule here any

different from the examples in *Mediaone*—which sustained a nearly identical confidentiality rule and specifically held that "[a]lthough the phrase 'customer and employee information, including organizational charts and databases' is not specifically defined in the rule, it appears within the larger provision prohibiting disclosure of 'proprietary information, including *information assets* and *intellectual property*.'" 340 NLRB at 279. So too here. Although the nearly identical rule here does not specifically define "company financial data," "plans and strategies (development, marketing, business)," or "organizational charts, salary structures, policy and procedures manuals," ER at 140, it too appears within the larger context of the rule prohibiting disclosure of proprietary information under the guest privacy policy and the company compliance manual. Under these circumstances, the Board itself recognized "that employees, reading the rule as a whole, would reasonably understand that it was designed to protect the confidentiality of Respondent's proprietary business information rather than to prohibit discussion of employee wages." *Id.*

The facts here are a far cry from *Flex Frac Logistics*, on which the Board relied. In *Flex Frac*, the employer unqualifiedly forbade employees from disclosing "personnel information." 358 NLRB 1131, 1132 (2012). As the Fifth Circuit explained, "[t]here is a substantial difference between 'Hotel-private information' and 'company business and documents' on the one hand and

'personnel information' on the other." *Flex Frac Logistics, L.L.C. v. NLRB*, 746 F.3d 205, 210 (5th Cir. 2014). Unlike *Mediaone* and the rule here, the *Flex Frac* employer's ban on disclosing "personnel information" was not listed as a "sub-set" of a category of otherwise proprietary information; no company manuals or privacy policies added context to the standalone ban. *Cf. Mediaone*, 340 NLRB at 278–79. Under those circumstances, the Board understandably determined that employees would reasonably believe "that they would face termination if they were to discuss their wages with anyone outside the company." *Flex Frac*, 358 NLRB at 1132.

Unlike *Flex Frac*, the rule here contained no prohibition on disclosing "personnel information" that a reasonable employee could associate with wages or other terms and conditions of employment. The ALJ identified no such elements, and instead based its decision on the fact that *Mediaone* "has already held that an employer's rule that barred the disclosure of 'organizational charts and databases' (the latter would almost certainly contain an employer's salary structures) among numerous other matters do not explicitly restrict section 7 activity." ER at 18, 200. Moreover, both the ALJ and Member Johnson, in dissent, concluded that the examples set forth in the rule "plainly establish" that "intellectual property" and "proprietary assets" were the interests Rio seeks to protect, *id.* at 19, 200—even more so when read in context with the company manual referenced in the rule and

the guest privacy policy one line below the rule. But if that alone were enough to compel the inference that the rule here prohibits employees from discussing wages, then an employer could *never* protect proprietary business information without specifically disclaiming section 7 activity. Adopting that per se rule would be both an arbitrary departure from the Board's prior precedent in *Lafayette Park*, *K-Mart*, and *Mediaone* and an unwarranted rewriting of the purposes of the Act—which are to promote industrial peace through protected concerted activity and the collective bargaining relationship.

The Board sought to distract from its departure from the *Lafayette Park* standard by pointing to decisions striking down confidentiality rules that explicitly prohibited employees from disclosing "employee" information, disciplinary rules, grievance procedures, and employee handbooks.[3] By confusing this kind of information—which is indisputably about the terms and conditions of

[3] *See Fresh & Easy Neighborhood Mkt.*, 361 NLRB No. 8 (2014) (striking down confidentiality rule that provided, "We have an important duty to our customers and our *employees* to respect the information we hold about them and ensure it is protected and handled responsibly"); *MCPc, Inc.*, 360 NLRB 216 (2014) (rule prohibiting disclosure of "confidential information within [the company], such as *personal* or financial information, etc." unlawful); *Quicken Loans, Inc.*, 361 NLRB No. 94 (2014) (rule prohibiting disclosure of "all personnel lists, rosters," and "*handbooks*" unlawful); *Cintas Corp.*, 344 NLRB 943 (2005) (striking down prohibition against releasing "any information" about employees); *Double Eagle Hotel & Casino*, 341 NLRB 112 (2004) (rules banning discussion of "*disciplinary information, grievance/complaint information, performance evaluations*" unlawful); *Flamingo Hilton-Laughlin*, 330 NLRB 287 (1999) (prohibition on revealing confidential information about "*fellow employees*" unlawful).

employment—with companywide financial data, strategies, research, and organizational structure, the Board attempts to convert the shield into the sword. But whatever the effect of these decisions on *Lafayette Park*, they are inapplicable: the rule here does not restrict disclosing information about employees, much less explicitly prohibit employees from disclosing indisputable terms and conditions of employment. To the contrary, the rule is limited to information that is interesting only to a stock broker or competing business.

In short, the relevant question is whether a reasonable employee would read the confidentiality rule in context with the "particularized examples," the company compliance manual, and the guest privacy policy one line immediately below it in the handbook. Having done so, no reasonable employee could read the rule here as restricting disclosure of wages or other terms and conditions of employment. Because there is absolutely no evidence from which the Board could conclude that there is an equally plausible reading of the rule, and because the Board agreed as much in *Mediaone, K-Mart*, and *Lafayette Park*, the Board's holding that the rule here violated section 8(a)(1) cannot be sustained.

B. The Board's Contrived Reading of the Rule Cannot Be Reconciled with Its Own Precedent.

The Board's finding cannot be sustained for another reason: it is inconsistent with the Board's retroactively applied new rule for evaluating facially neutral handbook policies. Here, the Board's analysis cannot be reconciled with what the

Board itself in *Boeing* instructed employers to do in drafting and maintaining work rules. Instead, the Board applied the same incoherent approach it abandoned in *Boeing*, and it failed to ask the critical question whether the employer, in maintaining its confidentiality rule, had "legitimate justifications associated with the requirement(s)" of the rule. *Boeing*, slip op. at 14. When there is no indication that the "potential adverse impact on protected rights is outweighed by justifications associated with the rule," there can be no violation of the NLRA. *Id.* at 15.

Applying that correct legal standard here, it is clear that Rio did not violate the NLRA. The confidentiality rule itself plainly had nothing to do with the terms and conditions of employment, as evidenced by the fact that the Board over a decade ago held that nearly identical language in *Mediaone* did not interfere with section 7 rights. *See Mediaone*, 340 NLRB at 278–79. Nor was Rio's business justification—to strike the delicate balance of guest privacy and fair gaming practice—entitled to any less weight than the identical justification Rio put forward for maintaining its no-recording rule that the Board found indisputably lawful. *See Boeing*, slip op. at 19 n.89. Indeed, there was absolutely no evidence suggesting otherwise, nor a precedent or Board finding to that effect. Instead, Rio's confidentiality policy was animated by its business justification alone and broadcast using simple prose so attenuated from the concept of wages and other

terms and conditions of employment that only a creative labor attorney could think otherwise. That the Board's topsy-turvy rules—applying one standard one day, then another version of the same standard the next, and finally a brand new standard today—gave the Company no realistic option to avoid an unfair labor practice charge is hardly a reason to blame Rio for making a good-faith effort to follow them, and in fact did follow them.

In short, there is no rational way to reconcile the Board's conclusion in this case with the standard it adopted in *Boeing* and applied retroactively or the reasoning or results of *Mediaone*, much less the long line of indistinguishable cases before and after it reiterating that employers have a statutory right to protect proprietary business information. The Board's finding of a section 8(a)(1) violation on this ground therefore cannot be sustained.

III. THIS COURT DOES NOT HAVE JURISDICTION TO ENFORCE THE BOARD'S ORDER

A more fundamental question must first be answered before deciding the merits of the Board's application. The Board asks this court to enforce an agency decision that would cause the withdrawal and replacement of a handbook. But the case and the fate of the handbook itself are still navigating the Board's own administrative channels. The question this court must therefore answer is a simple one: Can the Board petition this court to enforce an order that resolves some, but not all, of the allegations raised in a single complaint? Because the Board's failure

to resolve all the allegations of the complaint renders the order nonfinal, the answer is no. That is particularly true here, where the scope of the remedy—correction of the employee handbook—necessarily turns on adjudication of the remaining allegations. Nonfinal orders with incomplete remedies are not ripe for appellate review. *See, e.g.*, *Acura of Bellevue v. Reich*, 90 F.3d 1403, 1408-09 (9th Cir. 1996). And an appeal from such an order should be dismissed. *Id*.

The Board attempts to sidestep that otherwise routine conclusion. Although it does not dispute the finality requirement, the Board asserts that it can manufacture jurisdiction in this court by dint of deciding a portion of the case while "severing" and remanding the rest. Even though the Board is certainly free to remand claims for further adjudication, its made-up severance procedure—described nowhere in the Board's rules or regulations—cannot circumvent the bedrock requirement of finality. The Act, the sole source of this court's jurisdiction here, requires an application from a final order such that "jurisdiction of the court shall be exclusive." 29 U.S.C. § 160(e) (2016). That exclusive jurisdiction is just what the Board now asks this court to overlook by requiring Rio to revise its employee handbook only to revise it again—simply because the Board could not wait to seek enforcement of a final order.

A. The Board Cannot Vest this Court with Jurisdiction over an Otherwise Nonfinal Order by Unqualifiedly "Severing" Unresolved Claims from the Same Complaint.

The Board does not dispute that section 10(e) of the Act requires a final order. Yet without referring to a single rule or regulation (or even any sub-regulatory agency guidance), the Board insists it can vest this court with jurisdiction over an otherwise nonfinal order by unqualifiedly "severing" unresolved claims from the same complaint and remanding them for further adjudication. Although the Board has wide discretion to resolve or remand claims as it sees fit, it cannot create jurisdiction in the federal courts of appeals without a statutory basis. It is up to this court to determine the finality of the Board's order for jurisdictional purposes, and an order that fails to resolve all the allegations of a single complaint—particularly where, as here, the scope of the remedy depends on resolution of the remaining claims—is not final. *See Cordoza v. Pac. States Steel Corp.*, 320 F.3d 989, 996–98 & n.3 (9th Cir. 2003) (holding post-judgment order in analogous consent decree proceedings was nonfinal for jurisdiction purposes).

This court has but one source of jurisdiction over applications for enforcement of Board orders: section 10(e) of the Act. Throughout its 80-plus year history, the Act has been intended to give federal courts "the exclusive method of review in one proceeding after a final order is made." H.R. Rep. 1147, 74th Cong., 1st Sess., at 22 (1935). In arguing for jurisdiction, the Board states that "it is well-

established in Board proceedings that individual unfair-labor-practice allegations may be severed," which is what it did in this case. *See* Dkt. No. 22, Opp'n to Resp't Mot. to Dismiss ("Opp'n") at 6. In support, the Board cites "drive-by" jurisdiction rulings that merely decided appeals without addressing finality for purposes of appellate jurisdiction. But whatever the Board's authority to "sever" unresolved claims, the Board cites no basis whatsoever—not a rule, regulation, or even opinion letter—to suggest that any so-called severance has the talismanic effect of converting a nonfinal order into a final one. The Board cannot augment the jurisdiction of the federal court of appeal without more.

The Board seeks to distract from that lack of authority by pointing to appealed-from decisions in which federal district courts had severed misjoined claims from lawsuits under Rule 21 of the Federal Rules of Civil Procedure. Opp'n at 6. But whatever the effect of Rule 21's operation on conferring finality in that context, it is inapplicable to Board proceedings. The Board's reliance on misjoinder cases fails for another reason: Had this case originated in federal district court, it would not have been appropriate to sever the underlying allegations as misjoined. Under Rule 20 of the Federal Rules of Civil Procedure, claims joinder in a single action is appropriate when (1) the claims arise from the same transaction or occurrence, or series of transactions or occurrences and (2) the claims share a common question of law or fact. *See Coughlin v. Rogers*, 130 F.3d

1348, 1350 (9th Cir. 1997). The purpose of these requirements is "to promote judicial economy, and reduce inconvenience, delay, and added expense." *Id.* at 1351. It can scarcely be doubted that an attack on a single handbook based on related allegations and seeking revision or reissuance of the same handbook arises from the same transaction and a common question of law, the litigation of which in a single case reduces the added expense of duplicative handbook revisions.

Faced with so many obstacles, it might be tempting to move quickly to an analogous statute: 28 U.S.C. § 1291, Congress's general grant of appellate jurisdiction to the courts of appeals. But there, as here, the law favors dismissal, because while Federal Rule of Civil Procedure 54(b) allows a district court to certify partial orders as final, the Board's order in this case is "by [its] terms interlocutory." *Liberty Mut. Ins. Co. v. Wetzel*, 424 U.S. 737, 744 (1976). The order is inherently interlocutory because it resolves only four of the nine challenged handbook rules, and the legality of each of the nine must be known before a new handbook can be issued. Such an order cannot be final: orders "where assessment of damages or…other relief remains to be resolved have never been considered to be 'final.'" *Id.* And so the Board cannot seek to enforce a partial order now simply because the Board will decide what kind of relief will complete the partial order—sometime later.

Moreover, the facts here do not support a Federal Rule of Civil Procedure 54(b)-type certification. *See United States v. Gila Valley Irrigation Dist.*, 859 F.3d 789, 798 (9th Cir. 2017) (holding post-judgment order was not appealable "[b]ecause the district court failed to find there was no need for further delay"). In its applied-from decision, the Board ordered the administrative law judge assigned to the case to "prepare a supplemental decision." *See* Dkt. No. 1-5 at 14. "Supplemental" suggests that the decision is still part of the same proceeding.[4] More fundamentally, the Board itself has not promulgated any Rule 54(b)-type procedure by which parties or courts can evaluate finality when less than all claims have been resolved.

B. The Board's Application Is Premature because the Scope of the Remedy Necessarily Turns on Adjudication of the Remaining Allegations.

Were the tables turned and if Rio had filed a premature petition for review before this court, a similar jurisdictional barrier would stop Rio: the Act provides the limitation that "[a]ny person aggrieved by a *final* order of the Board . . . may obtain a review." *Id.* § 160(f) (emphasis added). Put another way, the petition would be dismissed for want of jurisdiction because the Board had "not issued a 'final' order." *Augusta Bakery Corp. v. NLRB*, 846 F.2d 445, 446-48 (7th Cir.

[4] The Board does not cite a single finding in its applied-from order that the remanded allegations were "discrete" for purposes of jurisdiction. More importantly, the administrative law judge's "supplemental" order retains the same case number as the original complaint and the applied-from order.

1988). The only difference is that section 160(f) refers to the exhaustion requirement "by which an injured party may seek review of an adverse decision and obtain a remedy," while, for the Board, section 160(e) "is concerned with whether the initial decisionmaker has arrived at a definitive position on the issue." *Darby v. Cisneros*, 509 U.S. 137, 144 (1993) (quoting *Williamson Cty. Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 193 (1985)). But, by its plain terms, this language focuses our attention on two measures of finality that are not met here: "First, the action must mark the 'consummation' of the agency's decisionmaking process," and "second, the action must be one . . . from which 'legal consequences will flow.'" *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997) (citations omitted).

First, there are alternative channels of review in this case that are presently underway—indeed, alternatives that will determine the appearance of the new handbook the Board seeks to have implemented. In particular, the portion of this case concerning the handbook's computer usage rules is still pending before the Board and has not yet been decided. The agency's decisionmaking process therefore has not been consummated. *See W. Radio Servs. Co. v. Glickman*, 123 F.3d 1189, 1196-97 (9th Cir. 1997) (holding agency process was not consummated when agency had not made final decision regarding road access and "challenge to the access road under NEPA [was] not ripe for review"). And to be sure, as here,

"[e]ven if final, an agency action is reviewable . . . only if there are no adequate alternatives" to judicial review. *U.S. Army Corps of Eng'rs v. Hawkes Co.*, 136 S. Ct. 1807, 1815 (2016). By the very procedural posture of the case, there is an alternative to this court's review: the Board itself is reviewing the administrative law judge's decision on the remaining portion of this case.

Second, the Board's partial order has yet to produce justiciable legal consequences, because a decision on the ultimate fate of the handbook has yet to be made. Yet, the Board would have Rio issue a new handbook from an old handbook before issuing a new handbook from the old handbook. Piling prepositional phrase upon prepositional phrase creates a bit of a compositional cloud. But the compositional cloud lifts when we reduce the Board's desired relief to a simple declarative sentence: the Board wants Rio to issue a new handbook. And it's too early to do so, because the Board itself has yet to decide on the appearance of the new handbook.

That's just the beginning. By prematurely filing an application for enforcement, the Board created the perverse situation in which Rio would have to issue a new handbook twice—once based on this enforcement application and again after the Board seeks enforcement of its final order yet to be issued. This court has held that such perverse situations cannot stand. More specifically, agencies must make determinations with legal consequences before seeking

enforcement under the Administrative Procedure Act ("APA"). *See Nippon Miniature Bearing Corp. v. Weise*, 230 F.3d 1131, 1137 (9th Cir. 2000) (holding enforcement under APA was premature until the legal consequence was final). To hold otherwise here would dislodge the Act from its jurisdictional sibling, the APA, and, with it, the duty to abide Congress's policy directions. *See* 5 U.S.C. § 704 (providing "[a] preliminary, procedural, or intermediate agency action or ruling not directly reviewable" may be reviewed only from a "final agency action"). But the Board would have this court run from the Act.

C. Premature Enforcement Would Be Grossly Unfair.

Not only would such jurisdictional manipulation be legally improper, but it would have significant practical consequences. First, enforcing the Board's order here would deprive Rio of its statutory right to petition this court or a sister court of appeals to review and set aside the Board's final order. *See* 29 U.S.C. § 160(f) ("Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged . . . , or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia."). By relying on the "sound policy" that "[h]aving two government bodies simultaneously review an agency action wastes scarce governmental resources," *see Acura of Bellevue*, 90 F.3d at

1408-09, Rio refrained from petitioning for review in its venue of choice in anticipation of the issuance of a final order in this case. Meanwhile, the Board filed an application for enforcement with this court.

Here is the problem: Congress established rules, codified at 28 U.S.C. § 2112(a), to consolidate multiple petitions from agency actions in different courts of appeals. If within ten days of issuing an order, the agency "receives, from the persons instituting the proceedings," 28 U.S.C. § 2112(a)(1), a petition for review that has been "stamped by the court with the date of filing," *id*. § 2112(a)(2), then the agency must file the relevant record in that court of appeals "notwithstanding the institution in any other court of appeals of proceedings for review of that order," *id*. § 2112(a)(1). As Rio waited in anticipation of a final order of the Board, the Board itself dashed to the nearest stamp machine to file a premature application for enforcement with this court. As a result, the rules prevented Rio from filing a petition in its own venue of choice. The Board's conduct here undercuts the purpose of section 2112(a), which is to "alert[] the agency that the petitioner cares about its chosen forum." *Remington Lodging & Hospitality, LLC v. NLRB*, 747 F.3d 903, 905 (D.C. Cir. 2014). Despite this purpose, Rio has not had the opportunity to alert the Board of its chosen forum. Instead, the Board prematurely filed its own enforcement application with this court and the ink from the stamp on the application has long since dried with still no final order issued.

In addition to depriving regulated entities of their choice of venue, premature enforcement could deprive them of the opportunity to obtain appellate review of the Board's findings altogether. The upshot of the Board's position is that the clock—for purposes of laches—for filing a petition for review (like an application for enforcement) runs from the date of the order, *even when that order did not resolve all the claims*. *See NLRB v. Searle Auto Glass, Inc.*, 762 F.2d 769, 772-73 (9th Cir. 1985) (applying temporal limitation to application for enforcement). Therefore, respondents that await the outcome of remand proceedings so they can appeal all the issues from a final order at once would be untimely as to the previously resolved claims. That jarring result is precisely why the Board cannot simply dictate the finality of its order by whim.

But practical implications aside, the law confers exclusive jurisdiction on federal courts of appeals over the case and the remedy sought if *and only if* the Board issues a final order. Where, as here, the Board fails to resolve all the claims within a single complaint, and where, as here, the remedy is intertwined with those unresolved claims, no final order exists: exactly what sort of new handbook Rio must issue which has yet to be decided within the Board's own administrative channels. The Board's "severance" of the still-pending claims cannot circumvent that finality requirement.

CONCLUSION

For the foregoing reasons set forth above, Respondent respectfully requests that the Court vacate and deny enforcement of the Board's decision and order, or otherwise dismiss the Board's application for enforcement.

Respectfully submitted,

January 2, 2018

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STATEMENT OF RELATED CASES

Respondent Caesars Entertainment d/b/a Rio All-Suites Hotel and Casino is not aware of any pending related cases within the meaning of Circuit Rule 28-2.6.

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 13,009 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Word 2010 with 14-point Times New Roman font.

/s/Lawrence D. Levien
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January 2, 2018

CERTIFICATE OF SERVICE

I hereby certify that, on January 2, 2018, I electronically filed the foregoing Opening Brief with the Clerk of the court for the United States Court of Appeals for the Ninth Circuit by using the CM/ECF system. All participants are registered CM/ECF users and will be served via the CM/ECF system.

/s/Lawrence D. Levien
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January 2, 2018